

WRIT PETITION NO. 4447 OF 2006.

V/s.

Madhavlal N. Pittie.
and others. ... Respondents.

V.Y.Sanglikar for the petitioner.

A.K.Abhyankar, senior counsel i/b. M/s.D.J. Kamdin & Co. for respondent No.1.

CORAM: V.C.DAGA, J.

DATED: 12th September 2006.

P.C.:

. Heard learned counsel for the rival parties.

. Perused petition.

2. This petition is directed against the order dated 30th June, 2006, whereby Interim Notice No.1500/2001 came to be made absolute and substitution came to be allowed.

3. The learned counsel appearing for the petitioner submits that in view of the earlier order of this Court dated 24th April, 2006, the trial Court could not have passed the impugned

order and should not have allowed impleadment.

4. The submission made is that the trial Court was not justified in allowing the amendment application, especially, when the respondent-plaintiff was well aware of death of original tenant and that he failed to join legal heirs of the original tenant as parties to the suit.

5. Having heard learned counsel for the petitioner, it is no doubt true that as per the earlier order of this Court, the motion taken out in the suit under order 22 rule 4 of Code of Civil Procedure, 1908 ("C.P.C." for short) came to be rejected by an order dated 24th April, 2006. It is also not in dispute that when this suit was filed, Smt.Saraswati B. Banarjee, joined as party to the suit as defendant No.1, was dead having expired much prior to the filing of the suit; i.e. on 5th December, 1996. The suit came to be filed on 11th October, 1997. It is, thus, clear that one of the defendants was dead when suit was filed. In that view of the matter, remedy under order 22 rule 4 of C.P.C. for bringing legal heirs of defendant No.1 on record was not available to the plaintiff since defendant No.1 was dead on the date of filing of suit. When appeal or suit is filed against a dead person

there can be no substitution. Suit filed against a dead person is a nullity as such there is no question of substitution. (see 1958 Cal 681; AIR 1961 Cal 336; AIR 1964 Mys 293; AIR 1977 P & H 180; and AIR 1978 Mad 294)

6. The only course left open with the plaintiff was to move under order 1 rule 10 of C.P.C. It was open for the trial Court to permit to impleadment of the necessary party in exercise of powers under order 1 rule 10(2) of C.P.C., if the trial Court was of the view that in absence of necessary party to the suit, issues involved in the suit cannot be effectually and completely decided. Thus, considering the sweep of provision of order 1 rule 10, the Court below was justified in passing the impugned order on the touchstone of order 1 rule 10(2) of C.P.C. (see AIR 1976 Goa 54; AIR 1984 P & H 373). Needless to mention that erroneous view on law does not operate as *res judicata*.

7. In the above view of the matter, the view taken by the Court below can very well be sustained though the reasons recorded in the

impugned order are not happily worded. Consequently, no interference with the impugned order is called for.

8. In the result, petition is dismissed in limine with no order as to costs.

(V.C.DAGA, J.)